

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-2801(L), 15-2805(Con)

Caption [use short title]

Motion for: Leave to File Brief as Amicus Curiae in
Support of Appellees' Petition for Panel Rehearing
or Rehearing en Banc

National Football League Management Counsel v.
National Football League Players Association

Set forth below precise, complete statement of relief sought:

Leave to File Amicus Brief Pursuant to FRAP
Rule 29

MOVING PARTY: American Federation of Labor and Congress of Industrial Organizations

☐ Plaintiff

☐ Defendant

☐ Appellant/Petitioner

☐ Appellee/Respondent

MOVING ATTORNEY: James B. Coppess

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James B. Coppess

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OPPOSING PARTY: National Football League

OPPOSING ATTORNEY: Paul Clement

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Washington, D.C. 20001

Court-Judge/Agency appealed from: United States District Court for the Southern District of New York, Judge Richard M. Berman

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☒ Yes ☐ No (explain):

Opposing counsel's position on motion:

☒ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☒ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?

☐ Yes ☐ No

Has this relief been previously sought in this Court?

☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested?

☐ Yes ☒ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes ☒ No If yes, enter date:

Signature of Moving Attorney:

/s/ James B. Coppess

Date: May 31, 2016

Service by: ☒ CM/ECF

☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 15-2801 (L), 15-2805 (Con)

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,
Plaintiff-Counter-Defendant-Appellant,

and

NATIONAL FOOTBALL LEAGUE,
Defendant-Appellant,

v.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, ON ITS OWN
BEHALF AND ON BEHALF OF TOM BRADY,
Defendant-Counter-Claimant-Appellee,

and

TOM BRADY,
Counter-Claimant-Appellee.

**UNOPPOSED MOTION OF AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE
BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES' PETITION
FOR PANEL REHEARING OR REHEARING EN BANC**

Pursuant to Federal Rule of Civil Procedure 29(b), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) moves for leave to file the attached brief as *amicus curiae* in support of the Petition for Panel Rehearing or Rehearing En Banc of Appellees National Football League Players

Association and Tom Brady. All parties have consented to the filing of this brief *amicus curiae*.

I. Statement of Interest

The AFL-CIO is a federation of 57 national and international labor organizations representing approximately 12.2 million working men and women. Most collective bargaining agreements negotiated by AFL-CIO-affiliated unions contain arbitration provisions to resolve disputes over the meaning of the contract, including with regard to discipline. As a result, the AFL-CIO has extensive experience with the operation of arbitration procedures in the disciplinary setting and a significant interest in the application of the proper standard for judicial review of decisions rendered pursuant to arbitration procedures.

II. Reasons Why The Proposed *Amicus* Brief Is Desirable and the Matters Asserted Are Relevant

This case concerns the Court's review of a decision by NFL Commissioner Roger Goodell rejecting the appeal by the National Football League Players Association of discipline issued to player Tom Brady. The panel majority subjected that decision to the highly deferential judicial review ordinarily extended to decisions of neutral arbitrators. The proposed *amicus* brief is desirable because it provides a clear explanation to the Court of the lack of procedural fairness in the underlying decision. A review of the substance of the Commissioner's decision makes clear that, in hearing the appeal, the Commissioner was acting in a role of

an employer seeking to justify his own initial disciplinary decision rather than as a neutral arbitrator.

The AFL-CIO therefore respectfully moves for leave to file the attached brief *amicus curiae*.

Dated: May 31, 2016

Respectfully submitted,

/s/ James B. Coppess
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CERTIFICATE OF SERVICE

I, James B. Coppess, certify that on May 31, 2016, the foregoing Unopposed Motion of American Federation of Labor and Congress of Industrial Organizations for Leave to File Brief as *Amicus Curiae* in Support of Appellees' Petitioner for Panel Rehearing or Rehearing En Banc was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit and served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy via first class mail.

/s/ James B. Coppess
James B. Coppess

15-2801(L)

15-2805 (Con)

IN THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,
Plaintiff-Counter-Defendant-Appellant,

and

NATIONAL FOOTBALL LEAGUE,
Defendant-Appellant,

v.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
ON ITS OWN BEHALF AND ON BEHALF OF TOM BRADY,
Defendant-Counter-Claimant-Appellee,

and

TOM BRADY,
Counter-Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, NOS. 15-5916, 15-5982

**BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING
OR REHEARING EN BANC**

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations representing approximately 12.2 million working men and women.¹ Most collective bargaining agreements (CBAs) negotiated by AFL-CIO-affiliated unions contain arbitration provisions to resolve disputes over the meaning of the contract, including with regard to discipline. As a result, the AFL-CIO has extensive experience with the operation of arbitration procedures in the disciplinary setting.

ARGUMENT

The panel majority subjected the decision by NFL Commissioner Roger Goodell (the “Commissioner”) rejecting the appeal by the NFL Player Association (the “Association”) of discipline issued to player Tom Brady to “highly deferential” judicial review. Slip Op. 3. That was error. Because the Commissioner – who issued the discipline to Brady in the first instance – failed to follow basic procedural fairness and acted arbitrarily as an employer seeking to justify his own disciplinary decision rather than as a neutral arbitrator considering an appeal – his decision should be vacated.

¹ No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made any monetary contribution to the preparation or submission of this brief.

While the NFL and NFLPA bargained to allow the Commissioner to hear appeals of disciplinary decisions, they did *not* agree to let the Commissioner, sitting as an appellate arbitrator, to act in a manner that is arbitrary and capricious. Regardless of who hears appeals, labor arbitration always must be fundamentally fair.

The Supreme Court has made clear that “elementary requirements of impartiality taken for granted in every judicial proceeding” are *not* “suspended when the parties agree to resolve a dispute through arbitration.” *Commonwealth Coatings Corp. v. Cont’l Casualty Co.*, 393 U.S. 145, 145 (1968). Even a cursory review of the Commissioner’s decision makes clear that he acted in the self-serving role of an employer justifying his own disciplinary decision rather than as a neutral arbitrator considering an appeal.

It is well-established that “an arbitrator [i]s to look only at the evidence before the employer at the time of discharge” and, therefore, “the correctness of a discharge must stand or fall upon the reason given at the time of discharge.” *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29, 39-40 & n.8 (1987) (citation and quotation marks omitted). “Other reasons can’t be added later when the case reaches arbitration merely in an attempt to strengthen the employer[’]s defense.” N. BRAND & M. BIREN, DISCIPLINE AND DISCHARGE IN ARBITRATION Ch. 2.II.A.3, p. 50 (2d ed. 2008).

Otherwise, the Association's bargained-for right to "appeal" "[an] action taken against a player by the Commissioner for conduct detrimental," JA345 (CBA Art. 46 § 1(a)), is rendered meaningless.

The Commissioner, rather than limiting his review to his initial rationale for the discipline, instead "change[d] the factual basis for the disciplinary action after the appeal hearing conclude[d]," Slip Op. 1 (Katzmann, C.J., dissenting). The initial discipline was based on the Commissioner's finding that Brady was "at least generally aware of the actions of the Patriots' employees involved in the deflation of the footballs and that it was unlikely that their actions were done without [Brady's] knowledge." JA329. In its appeal, the Association, therefore, contested whether the evidence relied upon by the Commissioner constituted "a legally []adequate basis upon which to impose this . . . discipline," JA 1119, *i.e.*, whether "general[] aware[ness]" of the wrongful actions of others is a sufficient basis for discipline under the CBA.

Rather than engage with this issue to test "the correctness of [the discipline]" based "upon the reason given at the time," *Misco*, 484 U.S. at 39 n.8 (1987), the Commissioner "attempt[ed] to strengthen the employer[]s defense," BRAND & BIREN, DISCIPLINE AND DISCHARGE, p. 50. As the dissenting panel member explained, the Commissioner made a "change

[that] was material” to the rationale for his initial disciplinary decision – from a theory that it was “more probable than not that Tom Brady . . . was at least generally aware of the inappropriate activities of [Jim] McNally and [John] Jastremski involving the release of air from Patriots game balls,” to a theory that “Brady ‘knew about, approved of, consented to, *and provided inducements and rewards* in support of a scheme by which, with Mr. Jastremski’s support, Mr. McNally tampered with the game balls[.]’” *i.e.*, that Brady knowingly “engaged in a *quid pro quo*.” Slip Op. 3 (Katzmann, C.J., dissenting) (quoting JA14 and SA51) (emphasis in Slip Op.).

The substantiality of “the Commissioner’s shifting rationale for Brady’s discipline,” *ibid.*, serves as strong evidence that the Commissioner was not acting as a neutral arbitrator considering an appeal at all, but rather as an employer seeking to justify his own initial disciplinary decision. The panel majority therefore erred in extending deference to the Commissioner’s decision.

CONCLUSION

The Court should grant the Association’s petition for panel rehearing or, in the alternative, grant the petition for *en banc* review.

Dated: May 31, 2016

Respectfully submitted,

/s/ James B. Coppess

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**CERTIFICATE OF COMPLIANCE WITH LENGTH, TYPEFACE
REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the length limitations of Fed. R. App. P. 29(d) because this brief is no more than one-half the maximum length authorized for appellees' principal brief by Fed. R. App. P. 35(b)(2) and Fed. R. App. P. 40(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in a 14-point type in a Times New Roman font style.

Dated: May 31, 2016

/s/ James B. Coppess

CERTIFICATE OF SERVICE

I certify that on May 31, 2016, the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Appellees' Petition for Panel Rehearing or Rehearing En Banc was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit and served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy via first class mail.

Dated: May 31, 2016

/s/ James B. Coppess